

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,
1030 15th Street NW, B255
Washington, DC 20005

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,
950 Pennsylvania Avenue NW
Washington, DC 20530

Defendant.

Case No. 19-cv-914

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Justice under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant has failed to comply with the applicable time-limit provisions of FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from

continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant U.S. Department of Justice (DOJ) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The Office of Information Policy (OIP), the Office of the Attorney General (OAG), the Office of Legal Policy (OLP), the Office of the Deputy Attorney General (ODAG), the Office of the Associate Attorney General (OAAG), and the Office of Legislative Affairs (OLA) are components of DOJ. DOJ has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

7. In July 2018, American Oversight submitted three FOIA requests to DOJ seeking records reflecting communications with external individuals and entities regarding judicial nominations.

OLP Supreme Court External Communications FOIA

8. On July 6, 2018, American Oversight submitted a FOIA request to DOJ seeking the following:

All records reflecting communications (including emails, email attachments, notes, hard copy correspondence sent through any medium including courier service, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, talking points, any handwritten or electronic notes taken during any responsive communications, and summaries of any responsive communications,) between the Office of Legal Policy and any of the individuals or entities listed below concerning potential, actual, or suggested nominations to the Supreme Court.

1. Leonard Leo, Executive Vice President, Federalist Society
2. John Malcolm, Heritage Foundation
3. Senator Mitch McConnell, or anyone who works for Senator McConnell
4. Senator Michael Lee, or anyone who works for Senator Lee
5. Any of the nine current Justices* serving on the Supreme Court, or anyone representing any of the nine current Justices

Please provide all responsive records from April 9, 2017, through the date the search is conducted.

*This request encompasses any record reflecting communications with Chief Justice Roberts or Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan or Gorsuch.

9. American Oversight also sought expedited processing of the request due to the anticipated nomination of an individual to fill the vacancy created by Justice Kennedy's retirement. On July 11, 2018, American Oversight supplemented the request for expedition.

10. DOJ assigned the OLP Supreme Court External Communications FOIA tracking number DOJ-2018-006392.

11. On July 16, 2018, DOJ acknowledged the OLP Supreme Court External Communications FOIA and denied American Oversight's request for expedited processing.

12. American Oversight has not received any further communications from DOJ regarding the OLP Supreme Court External Communications FOIA.

DOJ Supreme Court External Communications FOIA

13. On July 9, 2018, American Oversight submitted a FOIA request to DOJ similar to the OLP Supreme Court External Communications FOIA, though broader in scope, seeking the following:

All records reflecting communications (including emails, email attachments, notes, hard copy correspondence sent through any medium including courier service, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, talking points, any handwritten or electronic notes taken during any responsive communications, and summaries of any responsive communications) between DOJ and any of the individuals listed below concerning potential, actual, recommended, or suggested nominations to the Supreme Court. This request also seeks records reflecting communications between the individuals listed below and entities other than DOJ if those records were subsequently forwarded, or otherwise sent, to DOJ.

1. Leonard Leo, Executive Vice President, Federalist Society
2. John Malcolm, Heritage Foundation
3. Senator Mitch McConnell, or anyone who works for Senator McConnell
4. Senator Michael Lee, or anyone who works for Senator Lee
5. Any of the nine current Justices* serving on the Supreme Court, or anyone representing any of the nine current Justices

Please provide all responsive records from April 9, 2017, through the date the search is conducted.

American Oversight requests that DOJ search, at a minimum, the Office of Legal Policy (OLP) and the Office of the Attorney General for records responsive to this request. DOJ should also search other offices that it determines are likely to have records responsive to this request.

*This request encompasses any record reflecting communications with Chief Justice Roberts or Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan or Gorsuch.

14. DOJ assigned the DOJ Supreme Court External Communications FOIA tracking numbers DOJ-2018-006451(OAG) and DOJ-2018-006491(OLP).

15. American Oversight also sought expedited processing of the request due to the anticipated nomination of an individual to fill the vacancy created by Justice Kennedy's retirement. On July 11, 2018, American Oversight supplemented the request for expedition.

16. On July 11, 2018, American Oversight agreed that DOJ could consolidate the portion of the DOJ Supreme Court External Communications FOIA involving a search of OLP with the OLP Supreme Court External Communications FOIA.

17. On July 16, 2018, DOJ acknowledged the DOJ Supreme Court External Communications FOIA and denied American Oversight's request for expedited processing.

18. American Oversight has not received any further communications from DOJ regarding the DOJ Supreme Court External Communications FOIA.

Judicial Nominations External Communications FOIA

19. On July 24, 2018, American Oversight submitted a FOIA request to DOJ seeking access to the following records:

All records reflecting communications (including emails, email attachments, notes, hard copy correspondence, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, talking points, any handwritten or electronic notes taken during any responsive communications, and summaries of any responsive communications) between DOJ and any of the individuals or entities listed below concerning potential, actual, recommended, or suggested nominations to the federal judiciary, or concerning the process for identifying potential judicial nominees. This request also seeks records reflecting communications between the individuals listed below and entities other than DOJ if those records were subsequently forwarded, or otherwise sent, to DOJ.

1. Federalist Society (including but not limited to emails sent from addresses ending in @fedsoc.org)
2. Heritage Foundation (including but not limited to emails sent from addresses ending in @heritage.org)

3. Heritage Action for America (including but not limited to emails sent from addresses ending in @heritageaction.com)
4. Judicial Crisis Network (including but not limited to emails sent from addresses ending in @judicialnetwork.com)
5. Wellspring Committee
6. American Center for Law and Justice (including but not limited to emails sent from addresses ending in @aclj.org)
7. Great America Alliance
8. National Rifle Association (including but not limited to emails sent from addresses ending in @nra.org)
9. NRA Institute for Legislative Action
10. Leonard Leo
11. Jonathan Bunch
12. John Malcolm
13. Ann Corkery (including but not limited to the following email address: acorkery@steinmitchell.com)
14. Neil Corkery
15. Jay Sekulow
16. Jordan Sekulow
17. Nathanael Bennett
18. Eric Beach
19. Dan Backer
20. Ed Rollins
21. Ed Feulner
22. Jim DeMint
23. Kay Cole James
24. Ed Meese (also known as Edwin Meese III)
25. Angela Sailor
26. Hans von Spakovsky
27. Thomas Jipping
28. Genevieve Wood
29. Cleta Mitchell
30. Todd Adkins
31. James Atkinson
32. Brian Calabrese
33. Benjamin Cassidy
34. Chris Cox
35. James Holland
36. Wayne LaPierre
37. Jason Lawrence
38. David Lehman
39. Jason Ouimet
40. Brandi Pensoneau
41. Jack Thompson
42. Christopher Zealand
43. Gordon Speed

- 44. Matthew Schafle
- 45. Erica Rhoades

Please provide all responsive records from January 20, 2017, through the date the search is conducted.

American Oversight requests that DOJ search, at a minimum, the following offices for records responsive to this request:

- 1. The Office of Legal Policy
- 2. The Office of the Attorney General (search may be limited to political appointees*)
- 3. The Office of the Deputy Attorney General (search may be limited to political appointees)
- 4. The Office of the Associate Attorney General (search may be limited to political appointees)
- 5. The Office of Legislative Affairs (search may be limited to political appointees)

DOJ should also search other offices that it determines are likely to have records responsive to this request.

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

20. DOJ assigned the Judicial Nominations External Communications FOIA tracking numbers DOJ-2018-007115 (AG), DOJ-2018-007643 (DAG), DOJ-2018-007644 (ASG), DOJ-2018-007645 (OLP), DOJ-2018-007646 (OLA), and DOJ-2018-007647 (OIP).

21. On August 17, 2018, DOJ acknowledged the Judicial Nominations External Communications FOIA.

22. American Oversight has not received any further communication from DOJ regarding the Judicial Nominations External Communications FOIA.

Exhaustion of Administrative Remedies

23. As of the date of this complaint, DOJ has failed to (a) notify American Oversight of any determination regarding its FOIA requests, including the scope of any responsive records DOJ intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

24. Through DOJ's failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

Failure to Conduct Adequate Searches for Responsive Records

25. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

26. American Oversight properly requested records within the possession, custody, and control of DOJ.

27. DOJ is an agency subject to FOIA, and it must therefore make reasonable efforts to search for requested records.

28. DOJ has failed to promptly review agency records for the purpose of locating those records that are responsive to American Oversight's FOIA requests.

29. DOJ's failure to conduct an adequate search for responsive records violates FOIA and DOJ regulations.

30. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA requests.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

31. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

32. American Oversight properly requested records within the possession, custody, and control of DOJ.

33. DOJ is an agency subject to FOIA, and it must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

34. DOJ is wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce non-exempt records responsive to its FOIA requests.

35. DOJ is wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

36. DOJ's failure to provide all non-exempt responsive records violates FOIA and DOJ regulations.

37. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests;
- (2) Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: April 1, 2019

Respectfully submitted,

/s/ Daniel A. McGrath

Daniel A. McGrath

D.C. Bar No. 1531723

/s/ Elizabeth France

Elizabeth France

D.C. Bar No. 999851

AMERICAN OVERSIGHT

1030 15th Street NW, B255

Washington, DC 20005

(202) 897-4213

daniel.mcgrath@americanoversight.org

beth.france@americanoversight.org

Counsel for Plaintiff